

MICHAEL JAY BERGER (State Bar # 100291)
LAW OFFICES OF MICHAEL JAY BERGER
9454 Wilshire Boulevard, 6th Floor
Beverly Hills, California 90212
T: 1.310.271.6223 | F: 1.310.271.9805
E: michael.berger@bankruptcypower.com

Attorney for Debtor and Plaintiff,
Nuance Energy Group, Inc.

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re

NUANCE ENERGY GROUP, INC.,
Debtor and Debtor-In-Possession.

NUANCE ENERGY GROUP, INC., a
California Corporation,

Plaintiff,

v.

KODIAK MOON CORPORATION, a
California corporation; EDMUND
KERRY DAVIS, an individual; FOSHAY
ELECTRIC CO, INC., a California
corporation; TERRA STEWARD, LLC, a
California corporation; and DOES 1-25,
inclusive,

Defendants.

Case No.: 2:20-bk-17761-VZ

Adv. No.:

Chapter 11

**NOTICE OF REMOVAL OF CIVIL
ACTION TO UNITED STATES
BANKRUPTCY COURT**

**TO THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AND
ALL PARTIES IN INTEREST: PLEASE TAKE NOTICE THAT** pursuant to Rule 9027

1 of the Federal Rules of Bankruptcy Procedure and 28 U.S.C. § 1452, Plaintiff Nuance
2 Energy Group, Inc. ("Plaintiff"), hereby removes to the United States Bankruptcy Court for
3 the Central District of California, Los Angeles Division, all three (3) claims for relief set
4 forth in that certain state court action styled *Nuance Energy Group, Inc. v. Kodiak Moon,*
5 *Inc., et al.*, case number MSC18-02107, presently pending in the Superior Court of
6 California, County of Contra Costa, Martinez Courthouse (the "State Court Action") located
7 at 725 Court Street, Martinez, California 94553.

8 Counsel who have appeared in the State Court Action are: (a) Michael L. Branch, Esq.
9 of Schneider & Branch 655 West Broadway, Suite 1400 San Diego, California 92101
10 (attorney for Defendant Foshay Electric Co, Inc.); (b) Charles Pernick, Esq. and Mike C.
11 Flesuras, Esq. of the Opus Law Firm, 622 Encinitas, Suite 248 Encinitas, California 92024
12 (attorneys for Kodiak Moon Corp., Edmund Kerry Davis, and Terra Steward, LLC).

13 **PLEASE TAKE FURTHER NOTICE THAT removal of the State Court Action is**
14 **based on the following pertinent facts:**

15 1. On October 18, 2018, Plaintiff filed the State Court Action against
16 Defendants Kodiak Moon Corp., Edmund Kerry Davis, Foshay Electric Co, Inc., and Terra
17 Steward, LLC (collectively, "Defendants") alleging (1) Breach of Contract; (2) Fraud; and
18 (3) Conversion.

19 2. On May 31, 2019, Plaintiff filed a Motion to Strike Defendant Kodiak Moon,
20 Corp.'s (hereinafter referred to as "Kodiak") Answer and Enter Kodiak's Default (the
21 "Motion to Strike"). That same day, Plaintiff also filed a Motion Deeming Truth of the
22 Matters and Genuineness of Documents Specified in Requests for Admissions, Set One,
23 Admitted Against Defendant Kodiak (the "Motion to Deem RFAs").

24 3. On July 17, 2019, the Court heard Plaintiff's Motion to Strike and Motion to
25 Deem RFAs. At the conclusion of the hearing, the Court granted Plaintiff's unopposed
26 Motion to Strike Kodiak's Answer and enter the default of Defendant Kodiak. The Motion
27
28

1 to Deem RFAs admitted was ruled moot in light of the Court granted Plaintiff's Motion to
2 Strike.

3 4. On July 29, 2019, Plaintiff filed its Second Amended Complaint (the "SAC").

4 5. On August 28, 2019, Defendants Edmund Kerry Davis, and Terra Steward,
5 LLC filed their Answer to Plaintiff's SAC.

6 6. On October 2, 2019, the Court held a hearing on Defendant Foshay Electric Corp.,
7 Inc.'s (hereinafter referred to as "Foshay") Demurrer to Plaintiff's SAC. At the conclusion
8 of the hearing, the Court overruled Foshay's Demurrer to Plaintiff's SAC.

9 7. On November 1, 2019, Defendant Foshay filed its Answer to Plaintiff's SAC. That
10 same day, Defendant Foshay also filed a Cross-Complaint against Defendants Edmund Kerry
11 Davis and Kodiak for Unfair Business Practices, Misappropriation of Trade Name,
12 Indemnity, and Declaratory Relief ("Foshay's Cross-Complaint").

13 8. On December 9, 2019, Defendant Edmund Kerry Davis filed a Demurrer to
14 Foshay's Cross-Complaint

15 9. On December 16, 2019, the Court entered Default on Foshay's Cross-Complaint
16 as to Defendant Kodiak.

17 10. On January 28, 2020, Defendant and Cross-Complainant Foshay filed its First
18 Amended Cross-Complaint.

19 11. On June 16, 2020, the Court entered Default on Foshay's First Amended Cross-
20 Complaint as to Defendant Kodiak.

21 12. On August 25, 2020, ("Petition Date"), Debtor filed a voluntary Chapter 11
22 petition under Title 11 of the United States Bankruptcy Code, commencing *Nuance Energy*
23 *Group, Inc.* case number 2:20-bk-17761-VZ (the "Bankruptcy Case").

24 13. The State Court Action essentially seeks damages from Defendants stemming
25 from Plaintiff's (Debtor's) attempted purchase of Sunpower Modules (SPR-E19-320W).
26 Plaintiff paid a total of \$431,094.40 for all these units have received nothing in return, not
27 even a return of its money. Plaintiff contends that all Defendants were acting jointly in
28

1 defrauding Plaintiff with Defendant Edmund Kerry Davis purporting to act as the
2 representative for all entity Defendants. Attached hereto as **Exhibit "1"** is a true and correct
3 copy of Plaintiff's Second Amended Complaint in the State Court Action.

4 14. Plaintiff consents to the jurisdiction and adjudication of this dispute and to entry of
5 final orders or judgment by the Bankruptcy Court.

6 15. The Bankruptcy Court has "related to" jurisdiction over this matter pursuant to 28
7 U.S.C. § 1334(b).

8 16. The State Court Action is a civil action other than (i) a proceeding before the Tax
9 Court or (ii) a civil action by a governmental unit brought pursuant to its regulatory or police
10 powers.

11 17. The State Court Action is non-core, however, it is a proceeding related to a case
12 pending under Title 11, because the subject matter of the State Court Action involves
13 property of estate and because the Debtor is a party to the State Court Action.

14 18. Attached hereto as **Exhibit "2"** is a copy of the Notice of Status Conference re
15 Removal Action.

16
17 DATED: 11/18/2020

LAW OFFICES OF MICHAEL JAY BERGER

18
19 By: 

20 Michael Jay Berger
21 Attorney for Debtor and Plaintiff,
22 Nuance Energy Group, Inc.
23
24
25
26
27
28

EXHIBIT 1

FILED

2019 JUL 29 P 1:38

CLERK OF COURT
COUNTY OF CONTRA COSTA
BY: [Signature] CLERK

1 AILBEN RODRIGUEZ MAZANETZ (CSB#219949)
2 Gagen, McCoy, McMahon, Koss, Markowitz & Fanucci
3 630 San Ramon Valley Blvd., Suite 100
4 Danville, CA 94526
5 Telephone: (925) 837-0585
6 Facsimile: (925) 838-5985

7 Attorneys for Plaintiff
8 NUANCE ENERGY GROUP, INC.,
9 a Delaware corporation

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 COUNTY OF CONTRA COSTA

12 UNLIMITED CIVIL

13 NUANCE ENERGY GROUP, INC., a
14 Delaware corporation,

15 Plaintiff,

16 vs.

17 KODIAK MOON CORPORATION, a
18 California corporation; EDMUND KERRY
19 DAVIS, an individual; FOSHAY ELECTRIC
20 CO., INC.; a California corporation; TERRA
21 STEWARD, LLC, a California limited
22 liability company; and DOES 1 through 25,
23 inclusive,

24 Defendants.

02107
No.: MSC18-0217

SECOND AMENDED
COMPLAINT FOR:
(1) BREACH OF CONTRACT;
(2) FRAUD; and
(3) CONVERSION

DEMAND FOR JURY TRIAL

25 Plaintiff, NUANCE ENERGY GROUP, INC., ("Plaintiff") complains against
26 Defendants, and each of them, as follows:

27 PARTIES

28 1. Plaintiff is, and at all times relevant to this action was, a corporation duly
organized and existing under the laws of the State of Delaware, with its principal place of
business in Contra Costa County, California, and engaged in the business of delivering
turnkey solar design, engineering, and construction services for select markets.

Law Offices of
GAGEN, McCOY,
McMAHON, KOSS,
MARKOWITZ &
FANUCCI
A Professional
Corporation
630 San Ramon
Valley Blvd.
Suite 100
Danville, California
94526-4088
(925) 837-0585

1 AILEEN RODRIGUEZ MAZANETZ (CSB#219949)
2 Gagen, McCoy, McMahon, Koss, Markowitz & Fanucci
3 630 San Ramon Valley Blvd., Suite 100
4 Danville, CA 94526
5 Telephone: (925) 837-0585
6 Facsimile: (925) 838-5985

7
8 Attorneys for Plaintiff
9 NUANCE ENERGY GROUP, INC.,
10 a Delaware corporation
11

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 COUNTY OF CONTRA COSTA

14 UNLIMITED CIVIL
15

16 NUANCE ENERGY GROUP, INC., a
17 Delaware corporation,

No.: MSC18-0217

18 Plaintiff,

**SECOND AMENDED
COMPLAINT FOR:
(1) BREACH OF CONTRACT;
(2) FRAUD; and
(3) CONVERSION**

19 vs.

DEMAND FOR JURY TRIAL

20 KODIAK MOON CORPORATION, a
21 California corporation; EDMUND KERRY
22 DAVIS, an individual; FOSHAY ELECTRIC
23 CO., INC.; a California corporation; TERRA
24 STEWARD, LLC, a California limited
25 liability company; and DOES 1 through 25,
26 inclusive,

27 Defendants.
28

29
30 Plaintiff, NUANCE ENERGY GROUP, INC., ("Plaintiff") complains against
31 Defendants, and each of them, as follows:

32 **PARTIES**

33 1. Plaintiff is, and at all times relevant to this action was, a corporation duly
34 organized and existing under the laws of the State of Delaware, with its principal place of
35 business in Contra Costa County, California, and engaged in the business of delivering
36 turnkey solar design, engineering, and construction services for select markets.
37
38

Law Offices of
GAGEN, McCOY,
McMAHON, KOSS,
MARKOWITZ &
FANUCCI
A Professional
Corporation
630 San Ramon
Valley Blvd.
Suite 100
Danville, California
94526-4088
(925) 837-0585

1 2. Plaintiff is informed and believes and thereon alleges that, Defendant,
2 Kodiak Moon Corporation (hereinafter "Kodiak Moon") is, and all times relevant to this
3 action was, a California corporation duly organized and existing under the laws of the State
4 of California with its principal place of business in San Diego County, California.

5 3. Plaintiff is informed and believes and thereon alleges that Defendant,
6 Edmund Kerry Davis ("Davis") is, and all times relevant to this action was, an individual
7 and resident of San Diego County, California, and a shareholder, owner, officer, director,
8 manager, employee, agent or representative of the entity Defendants, Kodiak Moon, Terra
9 Steward, LLC, and Foshay Electric Co., Inc., and each of them.

10 4. Plaintiff is informed and believes and thereon alleges that Defendant, Foshay
11 Electric Co., Inc. (hereinafter "Foshay Electric") is, and all times relevant to this action
12 was, a California corporation duly organized and existing under the laws of the State of
13 California with its principal place of business in San Diego County, California.

14 5. Plaintiff is informed and believes and thereon alleges that Defendant, Terra
15 Steward, LLC (hereinafter "Terra Steward") is, and all times relevant to this action was, a
16 California limited liability company, duly organized and existing under the laws of the
17 State of California with its principal place of business in San Diego County, California.

18 6. As discussed further herein, differentiating between Defendants is actually
19 quite difficult given their intertwined relationships. For example, Plaintiff alleges that
20 Defendants Davis, Terra Steward are Foshay Electric are liable for the acts of Kodiak Moon
21 alleged in this First Amended Complaint, including agents and co-conspirators, as the alter
22 egos of Kodiak Moon. Recognition of the privilege of separate existence would promote
23 injustice because Defendants Davis, Terra Steward and Foshay Electric organized and
24 controlled Kodiak Moon and/or comingled their business activities and financial affairs so
25 that it is now, and at all times mentioned in herein was, merely an instrumentality, agency,
26 conduit, or adjunct of Defendants Davis, Terra Steward, Foshay Electric; and Defendants
27 Davis, Terra Steward and Foshay Electric, in bad faith, dominated and controlled Kodiak
28 Moon, including as follows:

Law Offices of
GAGEN, McCOY,
McMAHON, KOSS,
MARKOWITZ &
FANUCCI
A Professional
Corporation
630 San Ramon
Valley Blvd.
Suite 100
Danville, California
94526-4088
(925) 837-0585

- 1 • Defendants Davis, Terra Steward and Foshay Electric dominated the affairs
2 of Kodiak Moon. For example, during the parties' negotiations leading to the
3 execution of the subject contract, Defendant Davis represented to Plaintiff
4 that he was the representative of Kodiak Moon, Terra Steward and Foshay
5 Electric and that said entities operated in concert and coordination with each
6 other and thus, blurring any supposed lines between them.
- 7 • A unity of interest and ownership existed between Defendants Davis, Terra
8 Steward, Foshay Electric and Kodiak Moon, including, but not limited to the
9 common officers, directors or managers; common offices; common
10 employees; and common business functions. Again, for example, during the
11 negotiations leading to the execution of the subject contract, Defendant Davis
12 represented to Plaintiff that he was the representative of Kodiak Moon, Terra
13 Steward and Foshay Electric. Further, Davis's business card clearly stated
14 that he was a representative of all said Defendants: Kodiak Moon, Terra
15 Steward and Foshay Electric, and the websites for these Defendants clearly
16 and intentionally identify a common interest and/or partnership between
17 them.
- 18 • Kodiak Moon was a mere shell and naked framework for individual
19 manipulations by Defendants Davis, Terra Steward and Foshay Electric.
- 20 • Kodiak Moon's income, including the funds paid by Plaintiff herein, were
21 diverted to the use of Defendants Davis, Terra Steward and Foshay Electric.
- 22 • Kodiak Moon was inadequately capitalized and was or had been insolvent.
- 23 • Kodiak Moon failed to abide by the formalities of corporate existence.
- 24 • Adherence to the fiction of separate corporate existences would, under the
25 circumstances, promote injustice.
- 26 7. Similarly, and in the alternative, Defendants Terra Steward and Foshay
27 Electric are liable for the acts of Kodiak Moon alleged in this First Amended Complaint
28 under the "single-enterprise doctrine" in that, as herein alleged, (1) there is such a unity of

Law Offices of
GAGEN, McCOY,
McMAHON, KOSS,
MARKOWITZ &
FANUCCI
A Professional
Corporation
630 San Ramon
Valley Blvd.
Suite 100
Danville, California
94526-4088
(925) 837-0585

1 interest and ownership that the purported separate personalities of these Defendant
2 corporations/entities no longer exist, or are merged, so that one company/entity is a mere
3 adjunct of the others and the companies/entities form a single enterprise; and (2)
4 inequitable results will follow if the corporate separateness is respected, and the acts
5 alleged herein are somehow treated as those of Kodiak Moon alone.

6 8. Plaintiff is unaware of the true names, capacities, or basis for liability of
7 Defendants DOES 1-25, inclusive, and therefore sues said Defendants by their fictitious
8 names. Plaintiff will amend this Complaint to allege the true names, capacities, or basis of
9 liability when the same has been ascertained. Plaintiff is informed and believes and thereon
10 alleges that Defendants DOES 1-25, inclusive, and each of them, are in some manner liable
11 to Plaintiff.

12 9. At all times relevant to this action, each Defendant, including those
13 fictitiously named, was the agent, servant, employee, partner, joint venture or surety of the
14 other Defendants and was acting within the scope and said agency, employment,
15 partnership, venture, or suretyship, with the knowledge and consent or ratification of each
16 of the other Defendants in doing the things alleged herein.

17 **JURISDICTION AND VENUE**

18 10. Jurisdiction is proper in this Court because all of the counts asserted herein,
19 and the amount in controversy exceeds the jurisdictional minimum of this Court.

20 11. Defendants, and each of them, are subject to the jurisdiction of this Court by
21 virtue of their dealings and transactions in Contra Costa County sufficient to render the
22 exercise of jurisdiction by this Court permissible under the traditional notions of fair play
23 and substantial justice.

24 12. Venue is proper in this Court because the contract at issue was entered into
25 and accepted in Contra Costa County. Code Civ. Proc. § 395(a); *Turner v. Simpson*, 91
26 Cal.App.2d 590, 591 (1949).

27 Law Offices of
GAGEN, McCoy,
McMAHON, KOSS,
MARKOWITZ &
FANUCCI
A Professional
Corporation
630 San Ramon
Valley Blvd.
Suite 100
Danville, California
94526-4088
(925) 837-0585

FACTUAL ALLEGATIONS

13. On or about October 6, 2017, Plaintiff received a written Purchase Order (No. 777) purporting to be from Kodiak Moon (the "Agreement"), agreeing to purchase certain commercial solar modules to be supplied by Kodiak Moon, the material terms of which are as follows: (a) 2,664 units of commercial SPR-E19-320w Sunpower Modules; (b) \$192.00 per unit; and (c) total price of \$511,488.00, a true and correct copy of which is attached hereto as **Exhibit "A."**

14. At all times relevant herein and for multiple months preceding the actual Agreement, Davis held himself to Plaintiff as an officer of Defendants, Terra Steward and Foshay Electric, in the business of selling or brokering the sale of commercial renewable energy products for businesses and organizations like Plaintiff's business, even providing Plaintiff with a business card illustrating the same.

15. At all times relevant herein, when it came time to negotiate the material terms of the Agreement, Davis held himself out to Plaintiff as an officer of Defendants, Kodiak Moon, Foshay Electric and Terra Steward. In this instance, Defendants represented that they would act as a broker, purchasing the solar modules from a third party, Recom Solar, LLC, and re-selling them to Plaintiff.

16. On or about October 6, 2017, after Plaintiff had articulated its specific business needs to Davis, Davis specifically represented to Plaintiff that Kodiak Moon and/or the other entity Defendants was/were fully capable of delivering the SPR-E19-320w Sunpower Modules Plaintiff required. At the time Davis made this representation to Plaintiff, he knew that he and his companies would not deliver this product and/or that the product would not be available to Plaintiff at any time.

17. Soon thereafter, Plaintiff paid Kodiak Moon \$181,094.40, as the requested initial deposit toward the total purchase price of the subject Sunpower Modules, which all Defendants readily accepted.

Law Offices of
GAGEN, McCOY,
McMAHON, KOSS,
MARKOWITZ &
FANUCCI
A Professional
Corporation
630 San Ramon
Valley Blvd.
Suite 100
Danville, California
94526-4088
(925) 837-0585

1 18. Later in 2017, Plaintiff paid an additional \$250,000.00 toward the purchase
2 price of the subject Sunpower Modules, which Defendants again readily accepted, for a
3 total amount of \$431,094.40 paid to Defendants by Plaintiff.

4 19. After receiving Plaintiff's payment of \$431,094.40, in true "bait and switch"
5 fashion, Davis informed Plaintiff that he and his companies could not deliver commercial
6 SPR-E19-320w Sunpower Modules but could instead deliver SPR-320E-WHT-D modules,
7 a wholly inferior and incompatible product compared to what the Agreement required and
8 what Plaintiff had bargained (and paid) for.

9 20. Unlike SPR-E19-320w Sunpower Modules, SPR-320E-WHT-D modules
10 ("residential modules") were limited to residential applications, not the commercial
11 applications specifically required by Plaintiff per its Agreement with Defendants. Further,
12 these residential modules are incompatible with California commercial solar applications
13 being interconnected with major utilities, have only a 600-volt rating versus a 1000-volt
14 application (as Plaintiff required), and not surprisingly, these are not covered under any
15 manufacturer's warranty for commercial applications.

16 21. To date, and despite Plaintiff's repeated written and oral requests to
17 Defendants, Defendants refused to deliver the contractually required solar modules, or to
18 return any monies to Plaintiff.

19 22. In fact, Plaintiff was recently told that all the monies it paid are gone, and
20 Defendants have refused to give Plaintiff any information regarding said funds.

21 23. Following Defendants' express refusals to comply with the Agreement's
22 terms, Plaintiff discovered that Defendants, through their agent, Davis failed to deliver
23 most of the funds paid to them by Plaintiff to Recom Solar, LLC and instead diverted said
24 monies for Defendants' own, combined, comingled use, never returning one cent to
25 Plaintiff, nor providing Plaintiff with even one of the contracted-for commercial or any
26 other SPR-E19-320w Sunpower Modules.

27 24. All conditions precedent to the commencement of this action have occurred,
28 have been performed, or have been waived.

1 25. As noted, recognition of any privilege of separate existence would promote
2 injustice because Defendants Davis, Terra Steward and Foshay Electric organized and
3 controlled Kodiak Moon and/or comingled their business activities and financial affairs so
4 that it is now, and at all times mentioned in this First Amended Complaint was, merely an
5 instrumentality, agency, conduit, or adjunct of Defendants Davis, Terra Steward, Foshay
6 Electric; and Defendants Davis, Terra Steward and Foshay Electric, in bad faith, dominated
7 and controlled Kodiak Moon, such that liability must apply with equal force against all
8 Defendants.

9 **FIRST CAUSE OF ACTION**

10 **BREACH OF WRITTEN CONTRACT**

11 **(Against all Defendants and Does 1 through 25, inclusive, and each of them)**

12 26. Plaintiff re-affirms and re-alleges paragraphs 1-25, as though fully set forth
13 herein.

14 27. On or about October 6, 2017, Plaintiff entered into a written Agreement with
15 Defendants to purchase 2,664 units of commercial E19-320W Sunpower Modules for a
16 price of \$511,488.00.

17 28. Defendants contracted with Plaintiff with the intent to avoid performance and
18 to procure money from Plaintiff, knowing that any funds paid by Plaintiff would be
19 diverted.

20 29. Defendants, and each of them, breached the Agreement by refusing to supply
21 the agreed-upon units or return any portion of the \$431,094.40 paid by Plaintiff.

22 30. Plaintiff has performed all the terms and conditions required of it by the terms
23 of the Agreement.

24 31. Beginning on or about November 2017, Plaintiff demanded that Defendants
25 perform their promises under the Agreement. Defendants refused and continue to refuse to
26 perform under the Agreement or return any money to Plaintiff.

27
28
Law Offices of
GAGEN, McCOY,
McMAHON, KOSS,
MARKOWITZ &
FANUCCI
A Professional
Corporation
630 San Ramon
Valley Blvd.
Suite 100
Danville, California
94526-4088
(925) 837-0585

1 32. As a direct and proximate result of Defendants' breach of the Agreement,
2 Plaintiff has suffered general and special damages, including but not limited to, the sum of
3 \$431,094.40.

4 WHEREFORE, Plaintiff prays for judgment against Defendants as set forth herein.
5

6 **SECOND CAUSE OF ACTION**

7 **FRAUD**

8 **(Against all Defendants and Does 1 through 25, Inclusive, and each of them)**

9 33. Plaintiff re-affirms and re-alleges paragraphs 1-32, as though fully set forth
10 herein.

11 34. On or about July 2017, Brian Boguess, Chief Executive Officer and Founder
12 of Plaintiff, had a lunch meeting with Davis and Chris D'Avignon, in Dana Point,
13 California. It was at that meeting that Davis introduced himself to Boguess as Vice
14 President of Sales for Terra Steward and Foshay Electric, while D'Avignon introduced
15 himself to Boguess as the Chief Executive Officer of Terra Steward.

16 35. In addition to being given the business cards by both Davis and D'Avignon,
17 these two men described their plans to Boguess for solar mount racking, carport and energy
18 storage product development, market growth and electrical fulfillment services through
19 Terra Steward and Foshay Electric. In fact, at the meeting, Davis boasted that Foshay
20 Electric was a 99-year old electrical contractor with a vast network of contractors around
21 the country with the ability to act as an EPC contractor anywhere, or a contractor that
22 performs primarily engineering, procurement and construction work.

23 36. Shortly after the lunch meeting, Davis contacted Boguess to advise him that
24 D'Avignon was not well and that Davis would soon be promoted to President of both Terra
25 Steward and Foshay Electric.

26 37. On or about September 10, 2017, while in Las Vegas, Nevada, attending the
27 Solar Power Intentional Conference, Davis again met with Boguess as well as James Ryan,
28 Plaintiff's then-Chief Operating Officer, and advised them that he had been promoted to

Law Offices of
GAGEN, McCOY,
McMAHON, KOSS,
MARKOWITZ &
FANUCCI
A Professional
Corporation
630 San Ramon
Valley Blvd.
Suite 100
Danville, California
94526-4088
(925) 837-0585

1 President of both Terra Steward and Foshay Electric. At this meeting, Davis, Boguess and
2 Ryan discussed Terra Steward financing one of Plaintiff's projects. Additionally, Davis
3 represented to Boguess and Ryan that he could give Plaintiff a good deal on the solar panels
4 Plaintiff required to fit its specific needs.

5 38. On or about September 20, 2017, and based on Davis's representations to
6 Boguess at their prior meetings as to Terra Steward's and Foshay Electric's vast
7 connections and products and highly competitive pricing, Boguess contacted Davis by
8 telephone looking to purchase those specific commercial SPR-E19-320w Sunpower
9 Modules Plaintiff required for its project. It during that phone call that Davis, still
10 representing himself as Terra Steward's and Foshay Electric's officer, for the first time
11 mentioned the name "Kodiak Moon" to Boguess, and represented to Boguess that Kodiak
12 Moon worked with a third-party distributor, Recom Solar, LLC, which third-party
13 distributor was fully capable of and would deliver to Plaintiff the commercial SPR-E19-
14 320w Sunpower Modules Plaintiff required.

15 39. Davis made the foregoing representations to Boguess and Ryan on behalf of
16 all Defendants not only an effort to induce Plaintiff to enter into an Agreement, but also to
17 ensure that Plaintiff pay Defendants money for a product which Plaintiff would never
18 receive and money which Plaintiff would never see again. Davis knew that the
19 representations were false when he made them in that Davis knew that neither Terra
20 Steward, Foshay Electric nor Kodiak Moon, much less any third-party distributor affiliated
21 with Kodiak Moon, would deliver and/or had any intention of delivering the specific
22 commercial SPR-E19-320w Sunpower Modules Defendants knew Plaintiff required.

23 40. Moreover, Davis also knew that Plaintiff was certain to pay the requested
24 funds to Defendants and Defendants were certain to receive these funds from Plaintiff
25 based on (a) Davis's representations over a period of several months wherein he touted
26 Defendants' significant abilities, qualifications and connections which he knew impressed
27 both Boguess and Ryan; and (b) Davis's highly-believable representations and guarantees
28

Law Offices of
GAGEN, McCOY,
McMAHON, KOSS,
MARKOWITZ &
FANUCCI
A Professional
Corporation
630 San Ramon
Valley Blvd.
Suite 100
Danville, California
94526-4088
(925) 837-0585

1 that Plaintiff would necessarily receive the commercial SPR-E19-320w Sunpower
2 Modules that Davis knew Plaintiff required.

3 41. Davis knew that his representations regarding the product's availability was
4 false when he made them.

5 42. At all times, including during the parties' negotiation and execution of the
6 subject contract, and without disclosing the same to Plaintiff, Davis had a well-planned
7 scheme in mind: Davis intended that Plaintiff pay a significant sum of money to Defendants
8 for the ostensible purchase of commercial SPR-E19-320w Sunpower Modules which
9 Plaintiff would never receive, and only after Defendants had received Plaintiff's money
10 Davis then would notify Plaintiff that these commercial Sunpower Modules were suddenly
11 and unexpectedly unavailable, but could be necessarily replaced with a wholly inferior,
12 incompatible yet available product which Davis knew Plaintiff could never use.

13 43. Defendants intended for Plaintiff to rely on Davis's representations regarding
14 Defendants' abilities and the product's availability in order to induce Plaintiff to enter into
15 a written Agreement and pay a significant sum of money toward the purchase of a product
16 that would never be available and/or that Defendants never intended to sell.

17 44. Plaintiff reasonably and justifiably relied on Defendants' representations
18 regarding Defendants' abilities and the product's availability when it entered into a written
19 Agreement with Defendants; when it agreed to pay \$511,488.00 for 2,664 E19-320W
20 Sunpower Modules; and when it paid Defendants \$431,094.40 for the product -- a product
21 which would never be available and/or which Defendants never intended to sell to Plaintiff.

22 45. As a proximate result of Defendants' fraudulent representations, and
23 Plaintiff's reasonable reliance on it, Plaintiff sustained general damages, including
24 \$431,094.40 paid towards the product's purchase price.

25 46. As a proximate result of Defendants' fraudulent representations, and
26 Plaintiff's reasonable reliance on it, Plaintiff sustained special damages to be proven at
27 trial.
28

Law Offices of
GAGEN, McCOY,
McMAHON, KOSS,
MARKOWITZ &
FANUCCI
A Professional
Corporation
630 San Ramon
Valley Blvd.
Suite 100
Danville, California
94526-4088
(925) 837-0585

1 47. Defendants' false and fraudulent representations constituted the tort of
2 fraudulent deceit as defined in Civ. Cod. §§ 1709 and 1710.

3 48. Plaintiff did not discover or become aware that Defendants' representations
4 was false, fraudulent and clear "bait and switch" until *after* it had paid \$431,094.40 to
5 Defendants and after Defendants refused to return any portion of these monies. In other
6 words, Plaintiff was never provided with the product it had paid for, nor has any of the
7 monies it paid to Defendants ever been returned. In fact, Plaintiff has since been told that
8 the "money is gone."

9 49. Defendants acted oppressively, maliciously, with a conscious disregard of
10 the rights of others, and with the intent to defraud, harass, and annoy Plaintiff. Specifically,
11 Defendants engaged in a deceptive "bait and switch" method of selling by which Plaintiff,
12 a customer, purchased and paid for a specific product only to be later told that the product
13 was not available, but ironically, that a wholly inferior and incompatible product was
14 available. Moreover, Plaintiff has since discovered that all the monies it paid are gone; that
15 Defendants have refused to give Plaintiff any information regarding the whereabouts of
16 said funds; and that Defendants diverted Plaintiff's monies for their own use, never
17 returning one cent of it to Plaintiff, much less providing Plaintiff with the contracted-for
18 commercial SPR-E19-320w Sunpower Modules. As a consequence, Plaintiff is entitled to
19 punitive damages according to proof.

20 WHEREFORE, Plaintiff prays for judgment against Defendants as set forth herein.

21 **THIRD CAUSE OF ACTION**

22 **CONVERSION**

23 **(Against all Defendants and Does 1 through 25, Inclusive, and each of them)**

24 50. Plaintiff re-affirms and re-alleges paragraphs 1-49, as though fully set forth
25 herein.

26 51. Plaintiff has a right to ownership of the \$431,094.40 it paid to Defendants
27 under the Agreement.
28

Law Offices of
GAGEN, McCOY,
McMAHON, KOSS,
MARKOWITZ &
FANUCCI
A Professional
Corporation
630 San Ramon
Valley Blvd.
Suite 100
Danville, California
94526-4088
(925) 837-0585

1 52. On or about November 2017, Plaintiff demanded that Defendants return the
2 \$431,094.40 it paid. Defendants refused to comply with Plaintiff's demand for the return
3 of the property to Plaintiff.

4 53. In fact, Defendants intentionally diverted the monies paid by Plaintiff for
5 their own use, never returning one cent of it to Plaintiff with even one of the contracted-
6 for commercial SPR-E19-320w Sunpower Modules

7 54. Plaintiff has not consented to Defendants' wrongful exercise of dominion
8 over Plaintiff's property.

9 55. Plaintiff has been harmed by Defendants' conduct as alleged herein.

10 56. Defendants' refusal to return Plaintiff's \$431,094.40 was and is a substantial
11 factor in causing Plaintiff harm.

12 57. The taking and conversion of Plaintiff's property by Defendants was done
13 willfully and maliciously, with a reckless disregard for Plaintiff's rights. After demand was
14 made on Defendants for return of the property, Defendants willfully and maliciously
15 refused to return it to Plaintiff. For such willful and malicious acts on the part of
16 Defendants, Plaintiff seeks punitive damages in addition to its actual damages.

17 WHEREFORE, Plaintiff prays for judgment against Defendants as set forth herein.

18 As to the First Cause of Action:

19 1. For monetary and compensatory damages, including but not limited to, the
20 sum of \$431,094.40, together with interest at the legal rate from time such amount became
21 due.

22 2. For special damages in an amount in excess of the jurisdictional minimum of
23 this Court to be proven at trial;

24 As to the Second Cause of Action:

25 3. For monetary and compensatory damages, including but not limited to, the
26 sum of \$431,094.40, together with interest at the legal rate from time such amount became
27 due;

28

Law Offices of
GAGEN, McCOY,
McMAHON, KOSS,
MARKOWITZ &
FANUCCI
A Professional
Corporation
630 San Ramon
Valley Blvd.
Suite 100
Danville, California
94526-4088
(925) 837-0585

1 4. For special damages in an amount in excess of the jurisdictional minimum of
2 this Court to be proven at trial; and

3 5. For punitive damages according to proof.

4 As to the Third Cause of Action:

5 6. For the damages for the value of the property at the time of the conversion in
6 the amount of \$431,094.40, together with interest at the legal rate from time such amount
7 became due;

8 7. For damages for the time and money properly expended in pursuit of the
9 converted property according to proof and

10 8. For punitive damages according to proof;


11 As to All Causes of Action:

12 9. For Plaintiff's cost of suit incurred herein; and

13 10. For such other and further relief as the Court deems just and proper.
14

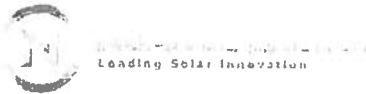
15 Dated: July 29, 2019

Gagen, McCoy, McMahon, Koss, Markowitz &
Fanucci
A Professional Corporation

17
18 By: 
19 Aileen Rodriguez Mazanetz
20 Attorneys for Plaintiff
21 NUANCE ENERGY GROUP, INC.,
22 a Delaware corporation
23

24 Law Offices of
GAGEN, McCOY,
McMAHON, KOSS,
MARKOWITZ &
FANUCCI
25 A Professional
Corporation
26 630 San Ramon
Valley Blvd.
Suite 100
27 Danville, California
94526-4088
28 (925) 837-0585

EXHIBIT A



Nuance Energy
6 Crow Canyon Court
San Ramon California 94583
9252604605
www.NuanceEnergy.com

Purchase Order

PO-00777

Vendor Address
Kodiak Moon
1585 Laurel Bay Lane
San Diego, CA 92154
EKD@kodiakmoon.com

Shipment preference : DDP

Deliver To
DDP- Customer Sites TBD
Central Valley CA
831-332-0466

Date : 10-05-2017

Delivery Date : 11-15-2017

Ref# : E-19 SPR Modules

Item & Description	Qty	Rate	Amount
Solar PV Module- E19 320W E19 320W Sunpower Modules	2,664	192.00	511,488.00
Sub Total			511,488.00
Total			\$511,488.00

Terms & Conditions

30% deposit
Balance due within 45 days, prior to delivery
Please Confirm Purchase Order upon receipt
Please call to schedule delivery- Delivery Address TBD

PROOF OF SERVICE

[Code Civ. Proc. §§ 1011, 1013; 1013a, 2015.5]

I, the undersigned, declare that I am a citizen of the United States, a resident of the State of California, and am employed in the County of Contra Costa, State of California. I am over eighteen (18) years of age and not a party to the above-entitled action. My business address is 630 San Ramon Valley Blvd., Suite 100, Danville, California. On July 29, 2019, I served the following documents:

**SECOND AMENDED COMPLAINT FOR: (1) BREACH OF CONTRACT;
(2) FRAUD; and (3) CONVERSION**

- ☐ **U.S. Mail:** I enclosed the documents in a sealed envelope or package addressed to the persons listed below and placed the envelope for collection and mailing following our ordinary business practices. On that same day, the envelope is deposited in the ordinary course of business with the U.S. Postal Service, at Danville, California, in the sealed envelope with postage fully prepaid.
- ☐ **Personal Delivery:** I caused the documents listed above to be personally delivered to the persons at the addresses noted below.
- ☐ **Overnight Delivery:** I enclosed the documents for service in an envelope or package provided by an overnight delivery carrier and addressed to the persons listed below. I placed the envelope or package for collection and overnight delivery at a regularly utilized drop box of the overnight delivery carrier.
- ☐ **Facsimile Transmission:** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed below from the machine at (925) 838-5985 on the date and time recorded on the attached copy of the fax transmission report, which I printed out. No error was reported by the fax machine that I used. Cal. Rules of Court, rule 2.306(h).
- ☒ **By E-mail or Electronic Transmission:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed below from Declarant's Email Address on the above date at _____ a.m./p.m. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. Cal. Rules of Court, rule 2.260(f).

See attached list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 29, 2019, at Danville, California.



Laura K. Barrett

Law Offices of
GAGEN, McCOY,
McMAHON, KOSS,
MARKOWITZ &
FANUCCI
A Professional
Corporation
630 San Ramon
Valley Blvd.
Suite 100
Danville, California
94526-4088
(925) 837-0585

Service List

Nuance Energy v. Kodiak Moon, et al.

Contra Costa County Superior Court Case No. C18-02107

Charles L. Pernicka, Esq.
Mick C. Flesuras, Esq.
The Opus Law Firm
662 Encinitas Blvd., Suite 248
Encinitas, CA 92024
Phone: (877) 775-4564
Fax: (877) 775-4564
charles@opus.attorney

Michael L. Branch, Esq.
Schneider & Branch
655 West Broadway, Suite 1400
San Diego, CA 92101
Phone: (619) 233-5500
Fax: (619) 233-5535
mlb@schneiderbranchlaw.com

Kodiak Moon Corporation
c/o Edmund Kerry Davis, CEO
10902 Evening Creek Dr. E, No. 1
San Diego, CA 92128
(Courtesy copy by U.S. mail)

Law Offices of
GAGEN, McCOY,
McMAHON, KOSS,
MARKOWITZ &
FANUCCI
A Professional
Corporation
630 San Ramon
Valley Blvd.
Suite 100
Danville, California
94526-4088
(925) 837-0585

EXHIBIT 2

<p>Attorney or Party Name, Address, Telephone & FAX Nos., State Bar No. & Email Address</p> <p>Michael Jay Berger (SBN 100291) Law Offices of Michael Jay Berger 9454 Wilshire Blvd., 6th Floor Beverly Hills, CA 90212 T. (310) 271-6223 F. (310) 271-9805 E. michael.berger@bankruptcypower.com</p> <p><input type="checkbox"/> Individual appearing without an attorney <input checked="" type="checkbox"/> Attorney for: Debtor Nuance Energy Group, Inc.</p>	<p>FOR COURT USE ONLY</p>
<p>UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES DIVISION</p>	
<p>In re:</p> <p style="text-align: center;">NUANCE ENERGY GROUP, INC.</p> <p style="text-align: right;">Debtor(s).</p> <p style="text-align: center;">NUANCE ENERGY GROUP, INC.</p> <p style="text-align: right;">Plaintiff(s),</p> <p style="text-align: center;">vs.</p> <p>KODIAK MOON CORPORATION, a California corporation; EDMUND KERRY DAVIS, an individual; FOSHAY ELECTRIC CO, INC., et al.</p> <p style="text-align: right;">Defendant.</p>	<p>CASE NO.: 2:20-bk-17761-VZ</p> <p>CHAPTER: 11</p> <p>ADVERSARY NO.:</p> <div style="border: 1px solid black; padding: 10px; text-align: center; margin-top: 20px;"> <p>NOTICE OF STATUS CONFERENCE RE REMOVAL OF ACTION</p> <p>[LBR 9027-1]</p> </div>

TO: ALL PARTIES IN REMOVED ACTION, ANY TRUSTEE APPOINTED IN THE BANKRUPTCY CASE, AND THE U.S. TRUSTEE: A Notice of Removal of Action (Removal Notice) was filed under 28 U.S.C. §1452(a), FRBP 9027 and LBR 9027-1(a). A copy of the Removal Notice accompanies this Notice of Status Conference (Status Conference Notice).

Removing Party: Nuance Energy Group, Inc.
Date of Filing of Removal Notice: November 16, 2020
Court/division from which action is removed: Superior Court of California, County of Contra Costa
Case No. of Removed Action: MSC18-02107

1) **Status Conference** – A status conference on the Removal Notice has been set for:

Hearing date:	Address:
Time:	<input checked="" type="checkbox"/> 255 East Temple Street, Los Angeles, CA 90012
Courtroom:	<input type="checkbox"/> 3420 Twelfth Street, Riverside, CA 92501
	<input type="checkbox"/> 411 West Fourth Street, Santa Ana, CA 92701
	<input type="checkbox"/> 1415 State Street, Santa Barbara, CA 93101
	<input type="checkbox"/> 21041 Burbank Boulevard, Woodland Hills, CA 91367

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California

- 2) **Service of Status Conference Notice** – Pursuant to LBR 9027-1(b)(3), no later than 14 days after the Status Conference Notice is issued and filed, the party who filed the Removal Notice must serve the Status Conference Notice on all parties to the removed action, any trustee appointed in the bankruptcy case, the United States trustee, and a judge's copy as provided in the Court Manual.
- 3) **Preserving Right to Jury Trial** – Pursuant to LBR 9027-1(e), no later than 14 days after service of the Removal Notice (plus an additional 3 days if you were served by mail, electronically or pursuant to F.R. Civ. P. 5(b)(2)(D),(E) or (F)), a party to the removed action must comply with LBR 9015-2 to preserve any right to trial by jury.
- 4) **FRBP 9027(e)(3) Statement** – Pursuant to FRBP 9027(e)(3), no later than 14 days after the filing of the Removal Notice (plus an additional 3 days if you were served by mail, electronically or pursuant to F.R. Civ. P. 5(b)(2)(D),(E) or (F)), a party to the removed action (other than the party who filed the Removal Notice) must file with the clerk the statement required under FRBP 9027(e)(3) and serve the statement upon all other parties to the removed action.
- 5) **Litigation Documents** – Pursuant to FRBP 9027(a)(1) and 9027(e)(2), and LBR 9027-1(d), subject to LBR 9027-1(d)(2)(B), no later than 30 days after the filing of the Removal Notice, the party who filed the Removal Notice must file with the clerk, all of the following items pertaining to the action being removed:
 - (a) A copy of the docket from the court where the removed litigation was pending; and
 - (b) A copy of every document reflected on the docket, whether the document was filed by a party or entered by the court. These copies must be provided in chronological order according to the date the document was filed.
- 6) **Joint Status Report** - Pursuant to LBR 7016-1(a)(2), no later than **14 days prior to the Status Conference**, all parties to this adversary proceeding must participate in filing a joint status report (JSR) and deliver a judge's copy as required in the Court Manual. The JSR must be prepared according to the instructions set forth on the court's website at www.cacb.uscourts.gov.

KATHLEEN J. CAMPBELL, CLERK OF COURT

Date:

By: _____
Deputy Clerk

In re: Nuance Energy Group, Inc.	Debtor(s).	CHAPTER: 11 CASE NUMBER: 2:20-bk-17761-VZ
--	------------	---

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

**9454 Wilshire Boulevard, 6th floor
Beverly Hills, CA 90212**

A true and correct copy of the foregoing document entitled (*specify*): **NOTICE OF REMOVAL OF CIVIL ACTION TO UNITED STATES BANKRUPTCY COURT** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On **11/19/2020**, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Debtor's Counsel: Michael Jay Berger michael.berger@bankruptcypower.com,
yathida.nipha@bankruptcypower.com;michael.berger@ecf.inforruptcy.com
Subchapter V Trustee: Gregory Kent Jones (TR) gjones@sycr.com, smjohnson@sycr.com;C191@ecfcbis.com
U.S. Trustee's Attorney: Kelly L Morrison kelly.l.morrison@usdoj.gov
Interested Party: Randall P Mroczynski randym@cookseylaw.com
Interested Party: Thomas J Polis tom@polis-law.com, paralegal@polis-law.com;r59042@notify.bestcase.com
United States Trustee (LA) ustprejon16.la.ecf@usdoj.gov

☐ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On **11/19/2020**, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Debtor:
Nuance Energy Group, Inc.
1223 Wilshire Blvd., Suite 357
Santa Monica, CA 90403

☒ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on **11/19/2020**, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Honorable Vincent P. Zurzolo
United States Bankruptcy Court
Central District of California
255 E. Temple Street, Suite 1360
Los Angeles, CA 90012 - UPS ground overnight

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

11/19/2020
Date

Peter Garza
Printed Name

/s/ Peter Garza
Signature

In re: Nuance Energy Group, Inc.	Debtor(s).	CHAPTER 11 CASE NUMBER 2:20-bk-17761-VZ
--	------------	--

2. SERVED BY UNITED STATES MAIL:

Counsel for Defendant Fosheay Electric Co., Inc.

Michael L. Branch, Esq.
Schneider & Branch
655 West Broadway, Suite 1400
San Diego, CA 92101

Counsels for Kodiak Moon Crop., Edmund Kerry Davis, and Terra Steward, LLC

Charles Pernick, Esq.
Mike C. Flesuras, Esq.
Opus Las Firm
622 Encinitas, Suite 248
Encinitas, CA 92024